United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1543

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P/S

to be argued by BRIAN F. TOOHEY

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

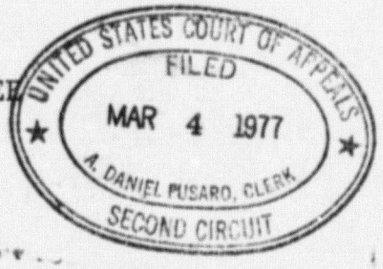
UNITED STATES OF AMERICA,
Appellant

v.

NICHOLAS ALBERTI,
Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT/APPELLEE



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ISSUES PRESENTED

1. Whether the district court's order granting defendant's motion for a new trial is appealable by the government under 18 U.S.C. 3731.

2. Whether the district court abused its discretion by granting defendant's motion for a new trial based upon its finding of potentially prejudicial publicity.

STATEMENT

Defendant testified before the Grand Jury for the Western District of New York on October 16, 1974. He was indicted on February 12, 1975 on one count of making false material declarations before the grand jury, in violation of 18 U.S.C. 1623.

Between the time the jury was selected on June 1, 1976 and the commencement of the trial of June 9, 1976, an article appeared in the Buffalo Evening News describing the activities at Nairy's Social Club which were the subject of the grand jury investigation. The article also related that another grand jury witness had pleaded guilty to perjury charges based upon testimony about the club. Defense counsel requested additional voir dire to determine whether any of the jurors had read the article (App. 93). The court refused to inquire if the jurors had read the article (App. 95).

Trial on the revised indictment (App. 58) commenced on Wednesday, June 9, 1976. On Friday, June 11, 1976, the defense moved for an acquittal based upon the insufficiency of the evidence and the imprecision of the testimony before the grand jury (Tr. 461-465). The court reserved decision on the motion (Tr. 465). Both sides completed their summations on Friday afternoon, and the jurors were excused until Monday morning.

The Friday evening edition of the Buffalo Evening News contained a prominently displayed article headlined, "PIERI, REPUTED MAFIA BOSS, ENDS FEDERAL JAIL TERM" (App. 76). The article contained references to defendant and the activities at Nairy's Social Club. Defendant was described as follows:

> The first trial stemming from that investigation--a perjury case against Nicholas Alberti, identified as a minor organized crime figure--was scheduled to go to the jury in Federal Court today.

Nairy's Social Club and two of the government witnesses at trial were tied in with the release of Pieri as follows:

> His parole was revoked by the U.S. Parole Board after he was named in detailed affidavits by an F.B.I. undercover agent, Richard A. Genova, and an

informant, Joseph Galioto, on the operation of Nairy's Social Club, 314 W. Ferry St. and the Blue Banner Social Club, 374 Connecticut St.

Mr. Genova and Mr. Galioto told of watching high-stakes card games and loan-sharking activities in the clubs between June and October, 1974.

The F.B.I. said then that Pieri was the likely leader of a council of syndicate lieutenants that took control of the Cosa Nostra in Western New York after the death of "Don" Stefano Magaddino in 1974.

* * *

Proceeds of the gambling and loan-sharking operations at the West Side clubs went primarily to this council, according to the F.B.I.

Pieri was named in the affidavits as one of several persons who made the major decisions on the hiring of club employes and the loaning of money at exorbitant interest rates.

On Monday, June 14, 1976, defense counsel brought the inflammatory article to the court's attention (App. 67) and asked that additional voir dire be conducted (App. 69). The prosecution also suggested individual questioning of the jurors (App. 69). Consistent with its prior refusal to conduct additional voir dire, the court indicated it was reluctant to

specifically inquire about the article. Defense counsel moved for a mistrial, which was denied (App. 69-70). After defense counsel requested a specific instruction, the court reconsidered and agreed to ask the individual jurors about the article (App. 70-71). However, when the jury returned to the courtroom, the court proceeded with the charge, neglecting to inquire of the individual jurors whether they had seen the article (App. 74, Tr. 567-592). The jury found the defendant guilty of the single count indictment (Tr. 595).

On June 18, 1976 defendant moved for judgment of acquittal and, in the alernative, for a new trial. On July 16, 1976 oral argument was heard on the motion. At the close of argument, defense counsel requested the court's permission to contact the jurors to determine whether any one of them had seen the article in question (Tr. July 16, 1976, 17). The court did not permit defense counsel to contact the jurors. Additional argument was heard on August 5, 1976 on the motion for acquittal on which the court had previously reserved decision under Rule 29 (Tr. 457, 465, 597-598).

On September 30, 1976 the district court, in a carefully reasoned fifteen page opinion, granted de-

fendant's motion for a new trial and struck certain portions of the indictment (App. 78-92). The government filed a notice of appeal on November 1, 1976.

ARGUMENT

I. THIS COURT LACKS JURISDICTION TO CONSIDER AN APPEAL BY THE GOVERNMENT FROM AN ORDER GRANTING A NEW TRIAL.

The government cannot take an appeal in a criminal case without express statutory authority. United States v. Sanges, 144 U.S. 310 (1892). The only statutory authority for such appeals is the Criminal Appeals Act, 18 U.S.C. §3731 (1971). The government contends this appeal is implicitly authorized by the first paragraph of Section 3731:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits furthur prosecution.

However, that paragraph applies only when the district court dismisses at least one count of the indict-

ment or information. This case is not in that posture. The district court's order did two things: (1) it granted a new trial due to possible prejudicial publicity; and (2) it struck certain portions of the grand jury testimony set forth in the indictment based upon imprecise questioning before the grand jury and the insufficiency of the evidence offered at the first trial. The order appealed from did not discharge the defendant and the one count indictment against him is still pending.

The government's reliance on United States v. Wilson, 420 U.S. 332 (1975), is therefore totally misplaced. Wilson involved a postverdict dismissal of the indictment, thereby satisfying the threshhold requirement for appealability under the first paragraph of Section 3731--termination of the proceeding in regard to at least one count of the indictment or information. Similarly, United States v. Jenkins, 420 U.S. 358 (1975), also cited as possible support for this appeal, is completely unrelated to the situation at hand. In Jenkins, the Supreme Court affirmed this Circuit's decision that it was without jurisdiction to hear an appeal of a "dismissal" of an indictment by the district court after a bench trial. Id., affirming 490 F.2d 868 (1973).

Both Wilson and Jenkins focused on the issue of whether double jeopardy was present; neither case involved a premature appeal of a pending case.

The balance of the cases relied upon by the government are recent Supreme Court decisions authorizing appeals after either dismissal of the indictment or suppression of the evidence subsequent to a conviction. These cases share a common feature; unless the government appealed, the proceeding was at an end. No case is cited by the government for the proposition that Section 3731 authorizes an appeal from an order granting a new trial. The granting of a new trial by a district court is an interlocutory order and is nonappealable because of nonfinality. Only final decisions may be appealed to the Court of Appeals, 28 U.S.C.A. §1291. "In criminal cases, as well as civil, the judgment is final for the purpose of appeal, 'when it terminates the litigation on the merits' and 'leaves nothing to be done but to enforce by execution what has been determined.'" Berman v. United States, 302 U.S. 211, 212-13 (1937). An order granting a new trial and overruling a motion for acquittal after the jury returns a verdict of guilty is not a final judgment. United States v. Swidler, 207 F.2d 47 (3rd Cir. 1953), cert. denied, 346 U.S. 915 (1953).

This Court has recognized that there must be a final termination of the case before Section 3731 is applicable. In United States v. Suarez, 505 F.2d 166 (2nd Cir. 1974), the intent of the Criminal Appeals Act is described as follows:

> While it is clear that the Criminal Appeals Act, as amended by the Omnibus Crime Control Act of 1970 (now 18 U.S.C. §3731) was intended to authorize an appeal by the Government from an order of a district court terminating a criminal case as far as is constitutionally permissible, in our view the Double Jeopardy Clause prohibits further prosecution. Id., at 167 (emphasis added).

Absent such a termination, the government cannot appeal. To hold otherwise would open the flood gates for appeals by the government on innumerable pre-trial and evidentiary rulings by the district courts.1/

II. THE DISTRICT COURT PROPERLY ORDERED A NEW TRIAL WHEN IT FOUND A POSSIBILITY OF SUBSTANTIAL PREJUDICE TO DEFENDANT.

Assuming, arguendo, that the government may appeal

1/ The limited pre-verdict review afforded the government upon suppression or exclusion of evidence under paragraph two of Section 3731 is inapplicable to this case and is not urged by the government as a basis for its appeal.

an order granting a new trial, this Court should not disturb the district court's finding that a new trial is required. The government's contentions, reduced to their essentials, are: (1) that a new trial is unnecessary because the news article was not sufficiently prejudicial to require individual questioning of the jurors; and (2) that the defendant has not proven actual prejudice.

1. The government's unwarranted conclusion that the only connection between the article and the defendant was the "passing reference to the defendant as a 'minor organized crime figure'" (Brief for Appellant, 9) may explain its failure to see the obvious potential for prejudice in the article. The district court properly recognized that there were a number of other pernicious factors in the article, including: (1) the implicit link between "Pieri, Reputed Mafia Boss" and defendant; (2) the statement that two key witnesses against defendant, F.B.I. agent Genova and informant Galioto, had successfully caused revocation of Pieri's parole; (3) the statement that proceeds from the gambling at Nairy's Social Club flowed to the Cosa Nostra; and (4) the suggestion that Pieri hired defendant to work at the club. These points, in addition to the "organized crime figure" label, must

be considered in determining the possible prejudicial effect of the article. Their likely impact must also be assessed in the context of their position in the newspaper, the wording of the headline, and the timing of the article--all factors properly considered by the district court. This Court should not substitute its judgment for that of the district court on the issue of the likely prejudicial impact of the article.

2. The government erroneously relies upon a Third Circuit decision, United States v. D'Andrea, 495 F.2d 1170 (3rd Cir. 1974), for the proposition that actual prejudice must be demonstrated by defendant before a new trial is required. D'Andrea is inapplicable because in that case the district court inquired of the individual jurors whether they had read the article, and the two jurors responding in the affirmative assured the court that this fact would not affect their ability to render a fair and impartial judgment. Id., at 1172. D'Andrea cannot be cited for the proposition that the risk of prejudice may be ignored in a case where such questioning should have taken place, but did not.

Once a risk of prejudice is perceived, the jurors should be individually queried as to their exposure to

the potentially prejudicial publicity.2/ The district court recognized that the publicity in this case "presented obvious prejudice to the defendant." (Opinion, 8). It also recognized that additional voir dire should have been undertaken, but it inadvertently neglected to do so.

2/ Section 3.5 (f) of the A.B.A.'s PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, "Standards Relating to Fair Trial and Free Press", provides as follows:

> (f) Questioning jurors about exposure to potentially prejudicial material in the course of the trial; standard for excusing a juror.
>
> If it is determined that material disseminated during the trial raises serious questions of possible prejudice, the court may on its own motion or shall on motion of either party question each juror, out of the presence of the others, about his exposure to that material. The method of examination shall be the same as that recommended in Section 3.4(a), above. The standard for excusing a juror who is challenged on the basis of such exposure shall be the same as the standard of acceptability recommended in Section 3.4(b), above, except that a juror who has seen or heard reports of potentially prejudicial material shall be excused if the material in question would furnish grounds for a mistrial if referred to in the trial itself.

The government's statement that the defendant made no attempt to determine actual prejudice (Brief for Appellant, 8) is simply untrue. At the close of the argument on July 16, 1976, the following colloquy occurred:

> Mr. Toohey: ...Mr. Siddens raised the problem of we don't know what the jurors did read and didn't read. May I have the Court's permission to inquire of the jury.
>
> The Court: Let us do this, Mr. Toohey. Let us hold that. Let me read the cases and the briefs and I think maybe I will have you back.
>
> Mr. Toohey: All right.
>
> The Court: Very well, but we will consider it submitted as of today. (Tr. July 16, 1976, 17).

Because defense counsel was denied permission to inquire, we will never know whether the jurors were exposed to the highly inflammatory article. The government continues to urge the ostrich approach to this problem——ignore the potential for prejudice and the problem will go away.

Fortunately, the district court, after considering all the circumstances, recognized that the status quo was unacceptable and that the only realistic solution to the problem was to grant defendant's motion for a new trial. This resolution was entirely within the court's

discretion under Rule 33. Indeed, the district court could have simply granted a new trial in the interest of justice, without elaboration. The government's position that the use of a supposedly erroneous standard by the district court entitles this Court to set aside the order for a new trial is unprecedented and contrary to elementary concepts of the efficient administration of justice.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this date copies of the foregoing brief have been mailed to counsel for the appeallant at the following addresses:

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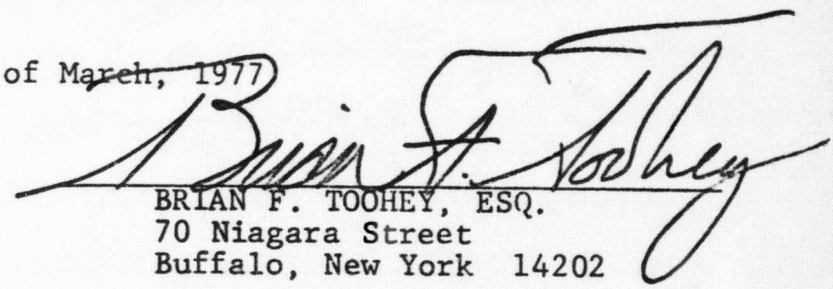
Dated this 2nd day of March, 1977



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